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Via Fax and First Class Mail

Hon. Philip Hogen, Chairman
National Indian Gaming Commission
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Washington, D.C. 20005
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Re: Comments on Electronic or Electromechanical Facsimile Definition (71 Fed. Reg. 30,232 (May 25, 2006)); Comments on Class II Classification Standards (71 Fed. Reg. 30,238 (May 25, 2006)); and Comments on Technical Standards (71 Fed. Reg. 46,336 (August 11, 2006)

Dear Chairman Hogen:

Enclosed please find the comments of Bally Technologies, Inc. on the National Indian Gaming Commission's proposed Class II Classification Regulations (71 Fed. Reg. 30,238 (May 25, 2006) and 71 Fed. Reg. 30,232 (May 25, 2006)) and the proposed Technical Standards (71 Fed. Reg. 46,336 (August 11, 2006)). As detailed below, we believe that the proposed regulations will result in harm to tribal Class II gaming operations significant enough to eliminate this industry. We respectfully urge the NIGC to withdraw the proposed regulations, which are contrary to the Indian Gaming Regulatory Act, case law and prior decisions by the NIGC, and take a fresh look at the classification issue after completing work on reasonable technical standards regulations, which could aid the Class II industry by helping to promote game integrity and compatibility.

Background

Bally has been a leader in the gaming industry for 75 years. Over these years, Bally has developed many of the innovations that are now common in the gaming industry, including the first video slot machine and the first video poker machine. In 2004, Bally acquired Reno, Nevada-based Sierra Design Group ("SDG"), a well-respected developer of Class II and central-determination networked gaming systems.[1] Since that time, Bally has continued to develop and provide to its tribal customers Class II games that are both legally compliant under federal law and commercially successful. Over this period, Bally has invested thousands of man-hours and millions of dollars to develop Class II games and currently has over 8,000 Class II electronic player terminals in play at dozens of tribal gaming facilities.

[1] In 2003, Sierra Design Group received a favorable Class II advisory opinion from the NIGC for its "Mystery Bingo" linked electronic bingo game.

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Bally objects to the NIGC's proposal to amend the definition of "Electronic or Electromechanical Facsimile" found at 25 C.F.R. 502.8.[2] According to the NIGC, this change is necessary to "make[] clear that all games including bingo, lotto and 'other games similar to bingo,' when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game." 71 Fed. Reg. 30,234.[3] This proposed change fails to recognize that both the legislative history of IGRA and case law indicate that the relevant test for facsimile is not whether the game is played in an electronic format, but whether the electronic format changes the fundamental characteristics of the Class II game by permitting a player to play alone with or against the machine.

The IGRA provides that Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind," 25 U.S.C. 2703(7)(B)(ii), however, the term "facsimile" is not defined by the statute. The legislative history suggests that Congress did not intend the facsimile prohibition to restrict the use of electronics to play bingo games. Instead, the term facsimile was used as shorthand for games where, unlike true bingo games, the player plays only with or against the machine and *not with* or against other players. As explained in the Senate Report:

> The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or current technology. The *Committee intends that*

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[2] The present rule, adopted in 2002, provides the following definition:

> Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

The proposed rule would change the definition to the following:

> (a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.
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> (b) Bingo, lotto, and other games similar to bingo are facsimiles when:
>
> (1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or
>
> (2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players. (Emphasis added.)

[3] As an initial matter, it is not clear from the proposal which characteristics are "fundamental" and what it means to "incorporate" a characteristic into an electronic format. If anything, this change to the definition of facsimile further confuses the distinction between Class II and Class III.

> *tribes be given the opportunity to take advantage of modern methods of conducting class II games* and the language regarding technology is designed to provide *maximum flexibility.* In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. *For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take.* Simultaneous games participation between and among reservations can be made practical by use of *computers and telecommunications technology* as long as the use of such technology does not change the *fundamental characteristics of the bingo or lotto games* and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, *such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.*

S. Rep. No. 100-446 at 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3079 (emphasis added).

In other words, the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a "facsimile." Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. 2703(7)(A)(i)) only becomes a facsimile if the technology permits the player to play "with or against a machine rather than with or against other players."

The courts have agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine. *See United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1100 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 724 (10th Cir. 2000).[4] As drafted, the NIGC's

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[4] The applicable test for distinguishing between aids and facsimiles was explained by the Tenth Circuit:

> Courts reviewing the legislative history of the Gaming Act have recognized an electronic, computer or technological aid must possess at least two characteristics: (1) the "aid" must operate to broaden the participation levels of participants in a common game, *see Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992); and (2) **the "aid" is distinguishable from a "facsimile" where a single participant plays with or against a machine rather than with or against other players.** *Cabazon Band of Mission Indians v. National Indian Gaming Comm'n*, 304 U.S. App. D.C. 335, 14 F.3d 633, 636-37 (D.C. Cir.), *cert. denied*, 512 U.S. 1221, 129 L.Ed.2d 836, 114 S.Ct. 2709 (1994) (*Cabazon III*). Courts have adopted a plain-meaning interpretation of the term "facsimile" and recognized a facsimile of a game is one that replicates the

proposed change to the definition of "facsimile" ignores this critical distinction in casting an unduly broad net over every electronic bingo game available and would unlawfully restrict the range of technologic aids available to tribes. There is no legal basis for the NIGC to alter the current definition, which was adopted in 2002, for the express purpose of bringing the NIGC's previous definition of "facsimile" into compliance with case law.

2. Comments on Class II Classification Standards.

Bally is also concerned with the new classification standards proposed by the NIGC. The NIGC proposal includes a comprehensive regulatory scheme in a new Part 546 for classifying and certifying Class II "games played with electronic components." Proposed 546.2. The proposed rule contains detailed requirements for such games and a process for approval by an NIGC-approved testing laboratory and the NIGC. Tribal gaming commissions have no meaningful role under this framework proposed by the NIGC, other than the ability to impose requirements in addition to those enumerated in the regulations. This is directly contrary to the IGRA, which specifies that tribes have the primary responsibility to "license and regulate ... class II gaming on Indian lands within such tribe's jurisdiction ... ." 25 U.S.C. 2710(b)(1).[5]

In addition, the substance of the proposed classification regulations would unlawfully restrict the range of Class II games available to tribes. Further the proposed regulations seem to be created solely to limit commercial viability of Class II gaming and not to address classification standards in any meaningful way. Based on Bally's knowledge of the Class II gaming industry, we believe these restrictions would interfere harmfully with all other Class II gaming and manufacturers. The proposed rule would restrict tribes to "traditional" bingo and allow only minor variations for games similar to bingo.[6] It also would restrict the types of technologic aids available to tribes for Class II games.[7] Ironically, the proposal would use technology not to provide maximum flexibility or to take advantage of modern gaming technology, but instead to use technology to restrict Class II gaming by requiring that Class II

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characteristics of the underlying game. *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) ("the first dictionary definition of 'facsimile' is 'an exact and detailed copy of something.'" (quoting Webster's Third New Int'l Dictionary 813 (1976))), *cert. denied*, 516 U.S. 912, 133 L.Ed.2d 203, 116 S.Ct. 297 (1995); *Cabazon II*, 827 F. Supp. at 32 (same); *Cabazon III*, 14 F.3d at 636 (stating "[a]s commonly understood, facsimiles are exact copies, or duplicates.").

162 MegaMania Gambling Devices, 231 F.3d at 724 (emphasis added).

[5] The NIGC also asserts jurisdiction over testing labs, which it does not have under the IGRA.

[6] In the preamble to the proposed regulations the Commission explains that it has decided to reject the view, expressed in the preamble to its 2002 regulations, that games similar to bingo are not required to meet all of the statutory requirements of bingo. As explained by the Commission in 2002, a game that meets all of the requirements of bingo would be bingo– not a game similar to bingo. According to the Commission, it was wrong in 2002 and even games similar to bingo must meet all of the statutory requirements for bingo. 71 Fed. Reg. 30,250. Only minor differences (the number of spaces on the card and the size of the ball draw) would be permitted for games similar to bingo, even though such games were previously recognized as "bingo." This dramatic change in position is, for the reasons expressed by the NIGC in 2002, illogical and contrary to the plain language of the IGRA.

[7] For example, the NIGC proposes to impose numerous arbitrary and unlawful limitations on the value of the game-winning prize, size of the ball draw, size of the bingo card, the number of releases of bingo numbers, the size of each release, the time period for each release, and the length of each daub period.

aids comply with arbitrary restrictions designed to slow game play, restrict prizes values and mandate levels of player participation and interaction with the aid device. This proposed language frustrates Congress's intent in adopting IGRA and additionally is not in line with our current tribal customer demands in order for these tribes to remain competitive in the national gaming industry.

Congress intended to cast a wide net to allow tribes to offer an expansive range of game variations under the broad category of bingo by broadly defining bingo to mean any game that meets three basic requirements set out in the IGRA. 25 U.S.C. 2703(7)(A)(i). In fact, Congress made clear that tribes could offer not just "bingo," but numerous related games – "pull-tabs, lotto, punch boards, tip jars, instant bingo ... ." *Id.* Moreover, rather than stop with the enumerated list of games, Congress then went on to specify that tribes also could offer any "other games similar to bingo." *Id.* In short, Congress was not trying to limit tribes to a restrictive set of bingo-type games (such as only games with a 5x5 card and 75 numbers), but, consistent with the Supreme Court's ruling in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), to recognize that tribes were entitled to offer a very vast range of Class II games. As explained in the Senate Report, "Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends ... that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development." S. Rep. No. 100-446 at 9. Further emphasizing the broad scope of Class II, Congress also explicitly stated that tribes could offer such games with "electronic, computer, or other technologic aids." 25 U.S.C. 2703(7)(A)(i). Bally makes a great effort to produce a wide array of Class II products by providing over 250 game variations, in order for our tribal clients to offer the best games available in accordance with the intent of the IGRA.

The IGRA draws a bright line between Class II and Class III gaming, allowing tribes to play as Class II games a wide range of bingo and specified bingo-like games and permits electronics to be used in the play of such games, as long as the electronics do not allow a player to play alone with or against the device. Bally has always been diligent in ensuring that these distinctions are inherent in our Class II game products. In the case of bingo, the IGRA specifies the requirements for a game to qualify as Class II bingo. Any game that meets the three IGRA classification requirements for bingo can be played with electronic aids as a Class II game, as long as the electronics are "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." S. Rep. No. 100-446 at 9. There is no basis or authority for the NIGC to impose additional classification requirements that are outside those set forth by Congress.

The courts have agreed with Congress' expansive reading of Class II. As explained by the Ninth Circuit:

> The Government's efforts to capture more completely the Platonic "essence" of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.

> There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?
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> Further, IGRA includes within its definition of bingo "pull-tabs, . . . punch boards, tip jars, [and] instant bingo . . . [if played in the same location as the game commonly known as bingo]," 25 U.S.C. § 2703(7)(A)(i), none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children. ... Instant bingo, for example, is as the Fifth Circuit explained in *Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner*, 98 F.3d 190 (5th Cir. 1996), a completely different creature from the classic straight-line game. Instead, instant bingo is a self-contained instant-win game that does not depend at all on balls drawn or numbers called by an external source. *See id.* at 192-93.
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> Moreover, § 2703(7)(A)(i)'s definition of class II bingo includes "other games similar to bingo," 25 U.S.C. § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

103 Electronic Gambling Devices, 223 F.3d at 1096. *See also 162 MegaMania Gambling Devices*, 231 F.3d at 723 ("While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game, as previously discussed.").

Nevertheless, the NIGC has crafted a regulatory scheme with the proposed regulations that fails to honor Congress' authorization for tribes to be able offer an expansive range of electronically-aided Class II games into a narrow authorization for a very limited form of electronic bingo. The end result is the creation by the NIGC of a new game that likely has never been played in any bingo hall at any time. Moreover, no electronic bingo game previously approved by the courts or the NIGC would satisfy these requirements, including electronic bingo games currently manufactured by Bally. This clearly is not what Congress intended when it enacted the broad Class II provisions of the IGRA.

Significantly, the proposed regulations are not consistent with how the NIGC has previously interpreted the IGRA. In the preamble to its 1992 definition regulations, the NIGC stated:

> [One] commenter suggested that class II gaming be limited to games involving group participation where all players play at the same time against each other for a common prize. In the view of the Commission, Congress enumerated those games that are classified as class II gaming (with the exception of "games similar

> to bingo"). Adding to the statutory criteria would serve to confuse rather than clarify. Therefore, the Commission rejected this suggestion.
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> [Another] commenter questioned whether the definition of bingo in the IGRA limits the presentation of bingo to its classic form. The Commission does not believe Congress intended to limit bingo to its classic form. If it had, it could have spelled out further requirements such as cards having the letters "B" "I" "N" "G" "O" across the top, with numbers 1-15 in the first column, etc. In defining class II to include games similar to bingo, Congress intended to include more than "bingo in its classic form" in that class.
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> . . . Congress enumerated the games that fall within class II except for games similar to bingo. For games similar to bingo, the Commission added a definition that includes the three criteria for bingo and, in addition, requires that the game not be a house banking game as defined in the regulations. The Commission believes that Congress did not intend other criteria to be used in classifying games in class II.

57 Fed. Reg. at 12382 - 12383, 12387 (1992).

In addition to our general objection to proposed classification standards, Bally offers the following non-exclusive list of specific objections.

Section 546.2- -Scope

According to the NIGC, the rule "is intended to address only games played with electronic components." The IGRA makes absolutely no distinction between "live session bingo" and those "live" games played with linked player stations and an electronic ball draw. Both are live Class II bingo games. Thus, the limitations on bingo aids covered by Part 546 are artificial, arbitrary and appear to be designed only to limit the profitability of such games to tribes.

Section 546.3 - - Definitions

The proposed section contains a number of arbitrary, and limiting, definitions for bingo, lotto, pull-tabs, instant bingo and other games similar to bingo, to which we object. These definitions are discussed below.

Game. Proposed section 546.3(a) unlawfully attempts to redefine the term "game" for bingo and other games similar to bingo, notwithstanding the fact that, as highlighted earlier, bingo is already defined by the IGRA. The three statutory requirements are the exclusive requirements for bingo. The NIGC's proposed definition of "game" would impose requirements beyond those found in the IGRA definition of bingo and therefore would be unlawful.

Sleep. It appears that this definition has been added by the Commission to support its opposition to "auto-daub." The definition defines "sleep" to include both failing to cover and failing to claim a prize. However, the IGRA definition of bingo does not require a separate "claim" action by the player. To the contrary, the IGRA provides that the game is "won" by the first player to cover a game-winning pattern. The imposition of an additional claim requirement is contrary to the IGRA requirements for bingo. There also is no legal basis for requiring that a player be permitted to "sleep" a bingo. The clear purpose of an electronic aid is to apply technology to aid the player against such unintentional acts.

Bally also offers comments on the next several definitions from Section 546.3 to assist with overall clarification of the proposed classification regulations, even though Bally does not manufacture lotto, pull tabs or instant bingo as Class II games.

Lotto. The proposed rule would define "lotto" to be a game "played in the same manner as the game of chance commonly known as bingo." Under this proposed definition, lotto would be defined out of existence as a separate Class II game. In interpreting the IGRA it is clear that Congress intended lotto to have a separate meaning since it is listed as a game separate from bingo.

Pull Tabs. This definition would mandate that pull-tabs be made of paper or other tangible material. In other words, it would preclude the possibility of electronic pull-tabs. This is contrary to recent case law in Ninth and Tenth Circuit holding that electronic bingo cards are permissible.

Instant bingo. According to the NIGC, the game is functionally the same as pull-tabs; however, Congress listed them separately and therefore clearly intends that they be treated as separate games.

Section 546.4 - Criteria for First Statutory Requirement - 25 U.S.C. 2703(7)(A)(i)(I)

Card Standards. While the rule would permit electronic cards, it states that the bingo game "shall fill at least ½ of the total space available for display." Proposed 546.4(b). However, it also provided that "[a]t no time shall an electronic card measure less than 2 (two) [sic] inches by two (2) inches or four (4) square inches if other than a square card is used." Proposed 546.4(b). These requirements are arbitrary, especially the requirement that ½ of the display space show the bingo game. In the preamble, the Commission explains that the card must be "clearly visible." However, as long as the card is clearly visible, there is no apparent justification for requiring that half of the display space show the bingo game. In fact, it is our belief that electronic bingo gaming systems produced by Bally clearly meet the original intent of a bingo display card without having to increase displays to at least half of the screen or visible playing area. This requirement is particularly arbitrary since it was never deemed necessary in any of the advisory opinions or in any of the previous drafts of the rule, all of which indicated that a 2x2 inch card is clearly visible. Further, we note that many bingo minders (which allow live-session players to play many cards at the same time) currently display individual cards that are smaller than 2x2.

The rule also would require that bingo be played with a traditional 5x5 card. Proposed 546.4(c). This is a dramatic change in position for the Commission, which has consistently taken the position over the years that Congress did not intend to limit tribes to traditional bingo. It also is contrary to the MegaMania cases. According to the Commission, other card configurations could be permitted as games similar to bingo. While this might sound reasonable, tribes and the Commission have viewed games similar to bingo as permitting a much wider range of bingo-type games, including ones that do not meet all of the IGRA requirements for bingo. In effect, the Commission's proposal would limit games similar to bingo to games that have, until now, been considered to be bingo. This change would have a significant negative operational impact, since games similar to bingo can be played only in locations where bingo is played. 25 U.S.C. 2703(7)(A)(i).

Display. The rule also would require that Class II games prominently display in two-inch letters a message that the game is bingo or a game similar to bingo. Proposed 546.4(d). Bally creates games with as much attention to art and detail as to the game play mechanisms in the games, in order to give our Class II tribal clients the most attractive products available. It is unclear why this message is necessary, especially if the bingo game is clearly displayed on the video screen. We do not see the need to disturb the aesthetics of the games in an unnecessary manner.

Prize Limitations. Further, the rule would impose significant limitations on prizes. The rule would prohibit "[r]andom or unpredictable prizes ... ." Proposed 546.4(g). According to the proposal, "[a]ll prizes in the game, except for progressive prizes, must be fixed in amount or established by formula and disclosed to all participating players in the game." Id. As further explained:

> All prizes in a game, including progressive prizes, must be awarded based on the outcome of the game of bingo and may not be based on events outside the selection and covering of numbers or other designations used to determine the winner in the game and the action of the competing players to cover the pre-designated winning patterns. The prize structure must not rely on an additional element of chance other than the play of bingo.

Proposed 546.4(n). In the preamble, the Commission clarifies that "the order of, or quantity of, numbers or other designations ... may affect the prize awarded for completing any previously designated winning pattern in a game." 71 Fed. Reg. 30,244. Bonus wheels and similar devices are common in Indian and non-Indian bingo halls, and there is no indication that Congress intended to restrict this aspect of "traditional" bingo. The preamble then goes on to describe several prize features that would not be permitted– "stand alone progressives," "mystery jackpots," "gamble feature" and "residual credit removal." We see nothing in the IGRA, which simply requires that bingo be played "for prizes," that would preclude random, mystery or unpredictable prizes which are commonplace.

In addition, the proposal would require that the game-winning prize be awarded in every game and be "no less than 20% of the amount wagered by the player on each card and at least

one cent." Proposed 546.4(j). We note that MegaMania, approved by the Ninth and Tenth Circuits, did not require that the game-winning prize be awarded in each game. The 20% or one-cent rule is completely arbitrary. The preamble provides no explanation as to how these amounts were determined by the Commission, which simply says that the prize "should have significant value."

Finally, the rule would distinguish between interim and consolation prizes, which the Commission recognizes can be awarded in addition to the game-winning prize. However, the rule would require that the ball release pause when enough balls have been released for the first potential game-winning pattern. Consolation prizes could only be awarded "after a subsequent release of randomly drawn or electronically determined numbers or other designations has been made." Proposed 546.4(l). However, these requirements would preclude games such as MegaMania from meeting the standard, since that game released balls in sets of three and did not pause if the first or second ball in the set were sufficient to achieve the game-winning pattern. As such, this requirement is arbitrary and unlawful.

Section 546.5- Criteria for Meeting Second Statutory Requirement

In this section the NIGC continues its effort to limit bingo to its view of what is "traditional." Again, such requirements are contrary to the IGRA and should be removed.

Pre-drawn Numbers. Bally also offers comments on the Pre-drawn Numbers definitions from Section 546.5 in order to assist with overall clarification of the proposed regulations, even though as a manufacturer we are not currently involved in this aspect of technology as related to our Class II products. The NIGC repeats its view (expressed in NIGC bulletins and advisory opinions) that games played with pre-covered or pre-drawn numbers (such as bonanza-style bingo) are not permitted to be played in an electronic format. The rationale, explained in the preamble, is that the term "when" used in the definition of bingo has a temporal meaning and requires that numbers be covered at the same time that they are drawn or determined. However, as in its previous guidance, the NIGC ignores the argument that when also has a conditional meaning (the player covers "IF" matching numbers are drawn or determined), even though the definition of "when" quoted by the NIGC in the preamble includes the conditional "IF" meaning. 71 Fed. Reg. 30,245. The NIGC is incorrect in its belief that games played with pre-drawn balls cannot be bingo or at least games similar to bingo, especially since such games are recognized as such under the laws of a number of states. For some reason, the Commission acknowledges that bonanza-style can be played in "live session bingo play." 71 Fed. Reg. 30,245. There is no logical basis for the Commission's position that such games can be played in a "live" format, but not with electronic aids. Both forms are "live" bingo games.

Auto-daub & Cover. The rule also prohibits "auto-daub" and requires that players "must take overt action after numbers or designations are released." Proposed 546.5(e). Further, the rule would impose time requirements on the ball release and daub periods. According to the rule, players must be given at least two seconds to daub after the release of each set of balls, with the game not permitted to proceed until at least one other player daubs but in no event in less than two seconds. Proposed 546.5(i). The rule also would prohibit a player from catching-up and covering previously missed balls later in the game, even though this is permitted in almost every

traditional bingo game. Proposed 546.5(j)-(l). An exception is made for the game-winning prize, but not for bonus or progressive prizes. It is our belief that the daub requirements, the imposed minimum period for the games to proceed, and the specific requirements to address a "sleeping" player will slow down the pace of play to render the games not viable. This conclusion is based on Bally's experience in the Class II industry nationwide. Also, there is no legal basis for any of these limitations. In the case of auto-daub, the restriction is particularly unreasonable, since this feature is common in non-Indian bingo halls throughout North America. As a technology aid, auto-daub assists players by preventing the unintentional act of missing a daub opportunity. Auto-daub features benefit players and enhance player participation in Class II gaming.

Substitute Players. The NIGC asserts that "[t]he gaming facility or its employees may not play as a substitute for a player." Proposed 546.5(n). There is no real explanation for this limitation, which would be contrary to an advisory opinion issued by the NIGC on November 14, 2000, where it opined that "proxy play" (where facility employees covered the cards for the players) was permitted for Class II games. Thus, this limitation should be removed.

Section 546.6- Criteria for Meeting Third Statutory Requirement- 25 U.S.C. 2703(7)(A)(i)(III)

Proposed Section 546.6(a) sets forth a number of additional requirements, which are arbitrary and should be removed. We discuss these provisions below.

Ball Release & Game Winning Pattern. The rule sets forth ball release requirements that appear to be intended to slow game play. According to the proposal, the game must: (1) provide for at least two releases of bingo numbers, (2) each release must take at least two seconds, (3) the bingo numbers must be displayed one-at-a-time, and (4) the first release cannot contain more than "one less than the number required for the game-winning pattern." Proposed 546.6(c)-(d). The rule has a number of further restrictions on the play of bingo and similar games. According to the rule, each game can have only one game-winning pattern, the winning pattern must have at least three spaces, and bonus patterns must have at least two spaces. Proposed 546.6(e)-(f).

In contrast to previous NIGC proposals, the Commission now agrees that the first release of bingo numbers "may contain the numbers or other designations necessary to form other winning patterns for bonus or progressive prizes." Proposed 546.6(h). However, the second release "may not extend beyond the quantity of numbers or other designations necessary to form the first available eligible game-winning pattern on a card in play in the game." Id. Significantly, no prize can be claimed (even bonus prizes won during the first release) until at least two ball releases have taken place. Proposed 546.6(i). This rule is contrary to the way games such as those approved by the courts (MegaMania) are played and is contrary to law. Further, this is contrary to common sense as a player is obligated to daub a ball draw set that cannot result in a wining combination. The net result of this arbitrary series of such wait/draw states is that the player gains no benefit of daubing while playing, as the game would wait for the minimum period, irrespective of the daub, resulting in players losing interest in daubing at all. Clearly, this

proposed scheme requiring artificially slowed-down play will severely limit player interest and participation.

Ante-up rules. Bally also offers comments on the Ante-up rule definitions from Section 546.6 in order to assist with overall clarification of the proposed classification regulations, even though as a manufacturer we are not currently involved in this aspect of technology as related to our Class II products. The draft rules would prohibit the "ante-up" style of game approved in the MegaMania cases. While NIGC concedes that ante-up games are permitted, it proposes game rules that are contrary to the game features approved in the MegaMania cases. Specifically, the game requires that at least two players must agree to ante-up. If not, the last player "will be declared the winner of the game-winning prize, and the game will end, provided that player obtains and covers (daubs) the game-winning pattern." Proposed 546.6(k). There is nothing controversial about awarding the game-winning prize to the last player if he/she covers the pattern. However, the NIGC then proposes the untenable requirement that "[i]f all players leave the game before a game-winning pattern is obtained and covered (daubed) by a player, the game *will be declared void and wagers returned to the players.*" *Id.* (emphasis added). Apparently, all players would get a full refund even if they had paid and played multiple rounds, but had dropped out before a player covered the game-winning pattern. On its face, this would appear to require refunds, even if the players had won interim prizes during earlier rounds of the ante-up game. This requirement is at odds with other gaming markets in which Bally produces products, including Class III markets that serve as competition for tribal Class II markets in that requiring refunds would lead patrons to question whether they can win on a game, or simply "is it fair?" Such a requirement would be at odds with the MegaMania cases and would be impractical.

Sleep. Proposed 546.6(n) provides that if a player sleeps the game-winning pattern "[t]he same value prize must be awarded to a subsequent game-winning player in the game." Thus, if there are two players in the game (one at a 5-cent buy-in level and one at a $5 buy in level) and the player at the higher level fails to cover the game-winning pattern, then the rule would require that the 5-cent player win the prize from the $5 level if he/she covers the game-winning pattern. We are not aware of any "traditional" bingo game that is played under such an unfair and arbitrary rule that penalizes players. The prize should be based on the prize table for the individual player's buy-in level. Again, it is Bally's experience in all other gaming markets that the games must appear to have unquestioned integrity and player wagers must be met with expected wins and losses.

Section 546.7- Criteria for Non-Electronic or Electromechanical Facsimiles Pull-tabs or Instant Bingo

Bally also offers comments on the criteria set forth in Sections 546.7 and 546.8 in order to assist with overall clarification of the proposed classification regulations, even though as a manufacturer, we are not currently providing non-electronic or electromechanical facsimiles of pull-tabs or instant bingo as Class II games.

This section reflects the NIGC's view that pull-tabs must be made of paper or other tangible material to avoid being an electronic or electromechanical facsimile. While the NIGC agrees that a technologic aid may "read and display the contents of the pull-tab as it is distributed

to the player," the proposed rule would not permit the device to validate the pull-tab or otherwise accumulate credits. We know of no rationale provided in the proposed rule why such a feature would be not allowed for a Class II aid device. Additionally, this section provides that the machine cannot pay out winnings to the player or dispense vouchers representing such winnings. Proposed 546.7(i). We believe if read quite literally this provision could be broadly interpreted to severely impact how winning tickets are generated. Also, the rule would require that the aid device display in two inch letters – "THIS IS THE GAME OF PULLTABS." Finally, the rule would limit the size of the print on the pull-tab to eight point font. Once again these requirements are arbitrary and contrary to law. These restrictions are not supported by law and should be removed.

Section 546.8- Pull-tabs or Instant as Electronic or Electromechanical Facsimile

The rule would prohibit pull-tab systems where paper pull-tabs are electronically read at a central location and the results transmitted to individual player stations. The NIGC provides no real justification for this limitation, except for a general unwillingness to allow any feature that was not expressly permitted favorably in recent pull-tab cases. There is no legal basis for this limitation, which should be removed.

Section 546.9- Approval Process for Games

The entire approval process is fundamentally flawed, in the sense that this process fails to respect the primary role of tribal regulators under the IGRA and takes away much of the authority of these tribal regulators. We believe that the tribes should regulate their own gaming operations at their facilities. For example, there is no ability under the proposed rule for a tribe or vendor to appeal a negative decision by the testing laboratory. This is contrary to fundamental due process. Further, the proposed rule would require advance certification by an independent testing laboratory recognized by the Commission before a game could be put in play. According to the proposed regulations, the Chairman of the NIGC or his designee would have 60 days to "interpose an objection to any certification issued by a testing laboratory ... ." Proposed 546.9(e). However, even after 60 days, the Chairman or his designee is permitted to object to a previously certified game "upon good cause shown." Proposed 546.9(e)(2). In other words, there never would be any certainty about a game classification decision. It likely would be impossible for a vendor to operate and raise capital for equipment or operations in such an uncertain regulatory environment. Bally submits games for approval in many other markets and one of the important benchmarks of these game approvals is a measure of consistency, both in approving or not approving games. It is critical for Bally to have knowledge that once approvals are granted that mass production of the game or game theme can begin. Our research, design and innovation would be stifled if we have to be preoccupied with the consequence that our game approvals could change or be revoked outright through no fault of Bally. Our preferred approach would be requiring testing and approval of proposed Class II gaming systems by an independent laboratory and the permitting subsequent approval of the products by the various tribal groups. Then, we would propose that if the NIGC finds any issues with the approval by the laboratory or the tribe, that a mediation process would start wherein the NIGC can identify problem areas and the tribes, vendors and/or laboratories can work to resolve these issues. As proposed, an objection to certification by the NIGC is a determination that the device in question at the time of such

decision by the NIGC is not a Class II device and thus an illegal device under federal law. We think it is unreasonable that manufacturers and tribal operators could be involuntarily placed in a position of breaking federal laws and assuming criminal liability simply for operating Class II devices that become illegal after initially receiving earlier approval to order, install and operate these exact devices.

Section 546.10- Compliance with Part 546 Standards

The rule would provide a transition period for tribes to bring their games into compliance. According to the proposal, "[f]or Class II gaming operations open on the effective date of this part or that open within six months of the effective date, certification [of the games] must be completed and authorization provided by the tribal gaming regulatory authority within six months of the effective date." Proposed 546.10(e)(1). It is unrealistic to develop, test, have certified and install tens of thousands of Class II games within six months of the final rule.[8] Bally believes it would take about two years to simply develop and produce one gaming system product that would be compliant with these classification regulations, let alone begin the testing and approval process and manufacture these products. We are hesitant to recommend any transition period at all, namely because we do not think these proposed classification standards will result in a viable game and also because we cannot speak for our tribal clients. However, anything less than three years is not practicable. In sum, we cannot start to even research game architecture under the proposed regulations because there is no certainty of the rule status, we would have a long development cycle if we start to develop a compliant gaming system, we would have to have the resulting products submitted and approved through the applicable regulatory process and then we would have administrative, manufacturing and production lead times for these potential new products, resulting in at least a three year period to produce these proposed new Class II gaming systems.

3. Comments on Technical Standards.

In proposing regulations that will create what is described as "a comprehensive regulatory scheme over Class II gaming," the NIGC has stated that its goal is to assure "that gaming is conducted fairly and honestly" and has said it believes the Commission must issue technical standards for electronic devices to promote the integrity and security of the equipment in Class II gaming. 71 Fed. Reg. 46336 (Aug. 11, 2006).

We agree that Technical Standards are an effective mechanism for achieving fairness and honesty in game play and device integrity. However, as proposed, the Technical Standards would result in unnecessary expense and economic hardship on tribes and manufacturers.[9] Additionally, Bally has produced Class II gaming systems in accordance with statutory requirements, regulations

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[8] We understand that there are presently over 50,000 electronic Class II games in play.

[9] Arguably, many of the proposed technical standards requirements go far beyond what even heavily regulated states like Nevada place on non-Indian games. *See* State of Nevada, Regulation 14.050, March 2006 (revised) and Nevada Gaming Commission and State Gaming Control Board, §§1.010 et seq., "Technical Standards for Gaming Devices." Further, the framework and structure of the proposed regulation encompasses incredible detail concerning the internal working of devices that greatly exceed even those standards typically used by regulatory agencies to ensure game fairness for non-Indian gaming and Class III devices under Tribal-State compacts.

and current case law. The proposed Technical Standards should be withdrawn and significantly revised based on input from tribes and manufactures.

We note that the NIGC did not hold consultation sessions with tribes on the proposed Technical Standards, and that the proposed Technical Standards were not published in the Federal Register until after the conclusion of the NIGC's regional consultation sessions. This failure to consult with tribes concerning such an important regulation. Unfortunately, this lack of consultation has, in part, led to a proposed rule that contains numerous shortcomings. We would hope that the NIGC will honor its consultation policy and conduct meaningful consultation with tribes concerning this proposal. It is our hope that reasonable technical standards can be developed that will help to protect tribes and the gaming public.

While we hope that the NIGC will withdraw the proposed rule for further consultation and refinement, below we list some of our specific comments and concerns.

Section 547.4(a) – We again note that manufacturers and tribal operators would have six months to comply with these proposed technical regulations. As stated this is not a realistic or practical time frame, even if extended by six months.

Section 547.6(d) - Most of the information listed here is generally stored on the client device and not the server. For example, most manufacturers only record the following data on the server: final game result, including progressive prizes awarded and, for bingo, game number and numbers or designations drawn, in the order drawn, enough to record all of the information required to establish a complete game.

Section 547.6(e) – These requirements in total are not required in other legal gaming jurisdictions. These proposed requirements would be harmful to a resulting product because of the overhead required on the gaming system to supply all of these messages.

Section 547.6(e)(19) – The phrase "aborted game" must reviewed and defined.

Section 547.7(m)(3) - This standard is not possible or necessary.

Section 547.7(q)(4)(i) – The regulation should clarify that side mount bill acceptor units are permitted.

Section 547.10(c)(4) – This rule should also apply for printers.

Section 547.11(b)(1) & (2) and Section 547.11(d)(1)(i) & (ii) – It is inappropriate for the NIGC to require a manufacturer to only use one predefined type of critical memory integrity checking. Industry standards support the use of a CRC signature to validate data and not require multiple copies.

Section 547.11(c)(1) - The requirements listed above are excessive. For instance, Class III gaming jurisdiction industry standards do not require the critical memory to be checked after Bill Input, Cashless Transfers, Vouchers Printed, or Vouchers Redeemed. Also the requirement for a

critical memory check before *and* after a game play is excessive, as industry standards for such checks are not compiled upon game play, but rather when data is requested for use.

Section 547.11(d)(4) - A processor can only be swapped out from a powered down state and only after the machine has been accessed. Additionally, many processors may be physically and logically identical to each other and there will be no possible way for a program to recognize the replacement has taken place. We recommend that tribal gaming regulators determine standards for moving or otherwise exchanging processors.

Section 547.11(e)(3) - This requirement is not recommended and should be removed. Gaming devices and their critical memory are often stored in a manner that is not "fault" tolerant. Any gaming device that has suffered critical memory failure has had its data corrupted. It would not be recommended that the gaming machine even attempt to determine what records are still viable and which are corrupted, because corrupted data could be used to perform this evaluation.

Section 547.11(f)(3) - This requirement is excessive. There are some configuration settings that can be changed after a critical memory reset that are *not* normally required to be secured- for example, hopper limits, printer limits, printer settings, attraction modes, etc. Also this rule does not make any provision for manufacturers that have a secured method (such as a set chip) of making certain specific configuration changes after a critical memory reset.

Section 547.13(a)(1)(iii) and Section 547.7(s)(3) – It generally is not possible to know if the coin diverter has physically failed.

Section 547.14(a)(2) – This requirement should be modified to permit a text, rather than graphical, representation of the game in the game recall.

Section 547.14(b) - Items #5 through #8 of this requirement are excessive. Accounting meters are already recorded elsewhere on the device. Additionally, the other items generally have their own recall as specified elsewhere in the regulations. We believe this requirement would lead to so much data on the reader screen that it will lead to an overly complicated display and lead to confusion in administering game operations. It would be redundant to require a manufacturer to display *all* of this information on a game recall screen, and is not in accordance with general industry standards for game recall information.

Section 547.17 - We ask that there be a complete review of the FAC concept in its entirety as it is implemented here. It is not used anywhere else in this form and we question the security when compared to other methods of software validation currently in use today.

Section 547.17(a)(1) - The required files to be on the FAC document are excessive. Any files, scripts, procedures, etc., not involved in the operation, calculation, display, or determination of game play and game results are not required to be controlled.

Section 547.17(b) and Section 547.17(c) – We do not believe the NIGC should directly attempt verification testing tools used by tribal gaming authorities. Also it appears that these sections seem somewhat confusing in that section (b) does not require particular implementation, but then

goes on to give some specific examples. Correspondingly, section (c) requires general methodology using a seeding mechanism. In this regard, we believe it would be more fair for any methodologies to have flexibility to meet current industry standards for verification. Specifying particular methodologies also creates a risk of inadvertently giving a monopoly to someone who holds a critical patent.

Section 547.23(a)(1) –This rule would require encryption whenever communications traverse public areas. Since the entire gaming floor is a public area we recommend that this be re-worded to reflect that encryption be used whenever the communications leave the physical building and that in-house communications be secure from other networks and servers in public areas.

Section 547.23(a)(5) - Items (v) through (viii) are typically transmitted via the communication protocol of the host accounting system which is not normally encrypted, and we see no rational basis to add encryption requirements in excess of current industry standards.

Section 547.23(b)(1) – We recommend that specific types of encryption algorithms not be listed, as it is possible that one of 'demonstrably secure' algorithms could be broken in the future. Additionally, there may be more secure encryption algorithms developed in the future, but they would not be listed here as a 'demonstrably secure' algorithm.

4. Responses to the NIGC letter dated September 27, 2006.

Bally participated in the joint response to the letter from the NIGC dated September 27, 2006. Thus we are aware that the NIGC currently knows of the general views of major Class II equipment manufacturers, and also of the fact that the members of this vendor group are unified on their position that the proposed regulations will irreparably harm the Class II tribal gaming industry. What follows are supplemental answers to the ones provided by the joint submission of the vendor group.

1. **What do you anticipate will be the effect of the proposed regulations on manufacturers? Tribes? Customers? States?**

The effect of the proposed regulations would be a substantial reduction in economic value to manufacturers, tribes, customers and states alike. The games will be much less appealing to customers, who would derive much less satisfaction from their tribal gaming experience. This will harm the tribes' business, who would then purchase less equipment from the manufacturer. States will be harmed due to the decreased economic activity and the job reduction that would result. The federal government will also be affected, as the tribes will be less self sufficient and more reliant on federal subsidies.

Further, we believe that the games permitted under the proposed regulations will be much less appealing to play and less profitable for tribes that the "grey market" gaming machines, or those gaming machines obtained from less than suitable vendors. Those games that are in fact non-compliant with the proposed regulations will proliferate once again.

2. **In your opinion, what are the primary changes that would need to be made to the proposed regulations?**

The primary changes needed are to adhere to the Ninth and Tenth Circuit Court decisions, namely that IGRA's three explicit criteria are the sole legal requirements for a game to count as class II bingo"

a. The game is played for monetary prizes with cards bearing bingo numbers.
b. The holder of the card daubs the card when numbers on their cards are electronically determined.
c. The game is won by the first person covering a previously designated pattern.

Other detailed changes to the proposed regulations involve eliminating the arbitrary requirements for games under the proposed regulations. In addition to a more comprehensive analysis submitted, just as an example, the following general requirements have no basis in law or policy for involvement in game play and should be removed from the proposed regulations:

a. Double touch (double daub) requirement;
b. 50% of the screen area dedicated to bingo;
c. Any lettering requirement for identifying bingo games;
d. The length of play and time requirements between plays.

All of these requirements needlessly interfere with the look and feel of a gaming machine and do not serve any purpose or improvement on the industry standard Class II games currently available. This is not a comprehensive list, but these are good examples of major requirements that are not acceptable.

Additionally, it is our belief that there must be more certainty to the approval process for proposed Class II certifications. Although the proposed classification regulations identify that a testing laboratory shall be used to certify that the games produced will meet the proposed regulations, the NIGC Chair has the ability to object to the determination of the lab, within 60 days or thereafter on good cause. As a manufacturer, Bally puts an extreme amount of effort into preparing game machines and components for certification to testing laboratories. We will spend hundreds, if not thousands of hours in labor to submit games in accordance with what we believe are the standards for a testing laboratory, only to be subject to potentially having to repeat the whole process. We would also note that our time spent does equate to money spent as well, and we would also be risking large sums of money associated with our labor expenses in this process. Additionally, we do not believe we would have machines that comply with the proposed Class II regulations within six months of the proposed effective date of the classification standards. We estimate that we would need several months simply to figure out what kind of game we could submit for approval. We would then be subject to labor availability, materials procurement and our own internal testing prior to submission. In addition to the great cost and time, we would not have any certainty that the work we did is correct due to the

somewhat arbitrary ability of the NIGC to challenge a testing laboratory finding. Our cost benefit simply would not support working with products in this type of testing environment for gaming machine approvals.

3. **Do you currently have any machines that would meet the proposed Class II regulations?**

Bally does not currently have any machines that meet the proposed regulations.

4. **Would you make machines that would comply with the proposed regulations if enacted? Yes_____ No_____ If not, why?**

It is unlikely Bally would manufacture machines in accordance with the new regulations. As explained further below, we would incur excessive development costs and it is our belief the tribal operators would not buy sufficient quantities to justify this type of investment. Simply the tribal operators would not purchase as many machines that are compliant with the proposed regulations, if the tribal operators continue in business at all.

5. **How long would it take for you to create compliant gaming machines?**

We believe this answer calls for proprietary business information disclosure and cannot submit a response here for this reason.

6. **Do you currently have machines in play in Indian Country that conform to the NIGC's General Counsel's opinions? How many and where?**

We believe this answer calls for proprietary business information disclosure and cannot submit a response here for this reason.

7. **Do you currently have Bingo machines in play in Indian Country that generally conform to the NIGC General Counsel opinions but are one touch games? How many and where?**

We believe this answer calls for proprietary business information disclosure and cannot submit a response here for this reason.

8. **If enacted, what will be the effect of the regulation changes on Class II gaming? Class III Gaming? Will the effect vary by location/region? Examples of greater/lesser impact?**

In general, the impact of the proposed regulations will be very harmful to tribal gaming in all regions. In terms of varying impact, the real result is simply the degree of negative impact on different tribal operations. Smaller tribal casino operations will most likely be driven completely out of business if games must comply with proposed regulations because of the expected decrease in play. However, to briefly summarize some major tribal gaming markets and the effectiveness of the proposed classification regulations, we

offer the following information based on experience in these markets as a long-time vendor. We also would specifically point out that this information is not intended by Bally to be construed as making any statements on behalf of any tribal nations in these or any other locations; rather, this is simply our response to the NIGC question.

Washington State- This is a market with a limit on the total number of Class III compacted gaming machines permitted in the state. These tribes can use current Class II gaming machines in the event expansion of their operations is required. Additionally, smaller tribes can operate the current Class II machines without concern of hitting state compact limits on Class III machines that would impact the casino games offered. In the event the Class II proposed classifications standards are implemented, the smaller tribes would close up due to decreased play on the Class II machines and overall, the tribes in Washington state would be left without any other viable alternative to the compacted Class III games which are limited statewide.

Florida- The Seminole tribe would continue to get some play on their machines simply because of the size, scope and locations of their casinos. However, operating the Class II machines as proposed with decreased revenues and also decreased customer interest and play would place the overall operations of the Seminoles in jeopardy.

Oklahoma- In Oklahoma, if the proposed regulations were enacted for Class II gaming, we believe this would simply accelerate the replacement cycle for Class III compacted games in the states. This would hurt the current player base in Oklahoma due to the fact that the players have accepted current Class II machines, and it would take some time to allow this market to mature with Class III games. Additionally, the accelerated replacement cycle would cause the tribes in Oklahoma to incur capital outlays in game procurement that are probably premature in current planning. We estimate 80% of the Oklahoma market is Class II currently and approximately 20% Class III compacted games. Thus to stay competitive in this market, the tribes would have to change almost all of their floors overnight.

Alabama- The Poarch Creek tribe in Alabama would be severely impacted if the Class II proposed classification standards are enacted. The tribe competes with state sanctioned charitable bingo operations and currently each group competes on a level playing field with the same types of Class II games currently available. However, upon enacting the proposed regulations, the tribes would operate slower, less user-friendly Class II machines regulated by the NIGC, while the commercial operators would still be able to use their current Class II machines.

Texas- The only options available for tribal gaming in Texas conducted by the Kickapoo Tribe, are Class II games currently permitted by the NIGC. As noted numerous times, the proposed Class II standards would result in games with less revenues and player interest, and the tribal operations in Texas would lose substantial business to competing Class III markets such as Louisiana or New Mexico.

9. What will be the effect on customers?

Overall, we believe the effect on customers will be to seek out alternative forms of entertainment, such as other commercial casino operations, lotteries or internet games. The average patrons of current Class II casinos will have much less of a choice in their options if the proposed new classification standards are enacted. The delays in playing the games will not be appealing to most patrons, and many will simply not play the new games.

10. **Will the proposed regulation impact the win per day? To what extent? What is the basis for your conclusion?**

The impact of the new classification standards will substantially decrease average net win per day in comparison with current Class II games being operated. We base this on prior experience and expected performance under the proposed classification standards. Operating games that take longer periods of time to play an individual game will by its very nature slow down the amount of wagers and play over time. Additionally, the standard requiring 20 percent of the wagers being returned to players will decrease the hold by the tribal casino operator further decreasing revenues. Additionally, the artificially imposed wager return standard will require new math programming that will not have had an opportunity to be used in live gaming environments and we believe it will take a long time to adjust the possible proposed math formulas to the extent that the proposed new bingo gaming systems will become as "player friendly" as possible. Overall, we believe these combined factors will reasonably result in a decrease in average net win of Class II terminals by approximately 80 percent of current Class II revenue levels. Furthermore, this decrease is factored into decreased revenues *before* taking into account the fact that the substantial reduction in appeal of the gaming systems to the players under the proposed Class II regulations will cause a large decrease in play from current Class II levels.

The simple analogy is with a less friendly product, fewer consumers will use that product. We also note that the independent study released by the NIGC on the impact of the proposed Class II regulations on tribal gaming revenues is consistent with our views. The NIGC study recently completed by Dr. Alan Meister indicates a decline in Class II revenue of 57 percent if the proposed regulations are implemented. While our methods are not identical to the study concluded by Dr. Meister, we think we are reasonably accurate in our estimates of lost revenues due to the proposed Class II regulations.

11. **Will the proposal affect the supply of Class II gaming devices? Will tribal casinos need to increase/decrease their counts? If so, why and how much?**

We believe the proposed classification regulations will certainly have a negative effect on the supply of gaming systems from the blue chip gaming machine manufacturers. Because of the less appealing play of the proposed games, tribal casinos will need to decrease their machine counts in order to balance out the reduction in demand for the games. Additionally, we believe that as tribes are decreasing the amount of games that would be compliant with the proposed classification standards, the number of grey

market games would increase. So-called "grey market" games are built in a manner that is not in strict compliance with current or proposed regulations and as a result, play more in accordance with Class III machines. These machines are also manufactured by companies that are not as widely licensed as Bally and thus do not have as much at stake if they are challenged on the legality of their games. Bally could lose gaming licenses worldwide if such an event were to occur. A grey market operator does not have privileged licenses to put at risk. The effect will be to take Class II tribal game back several steps into the era where grey market games and operators dominated.

12. **What percentage of your games is sold versus leased to tribes? ____% sold % leased_____**

We believe this answer calls for proprietary business information disclosure and cannot submit a response here for this reason.

13. **In your experience, what is the life expectancy of a Class II gaming machine?**

The life expectancy of a Class II gaming system itself is about five to seven years, however, this is an assumption made with the understanding that the underlying bingo gaming system platform remains static and does not change except for software updates to the existing technology architecture. The underlying system can change as a result of regulatory changes, or market requirements or NIGC direction, and over the past several years our experience is that these changes do occur. As a result, the actual gaming system devices themselves that are offered to casino patrons may have to change on extremely short notice to accommodate system changes.

14. **In your experience, how often do tribes switch out Class II gaming machines?**

We believe this answer calls for proprietary business information disclosure and cannot submit a response here for this reason.

15. **Generally, what are the costs of acquiring new Class II machines (lease versus purchase?) (i.e., switching cost)**

We believe this answer calls for proprietary business information disclosure and cannot submit a response here for this reason.

16. **How many of your Class II bingo machines have two video displays? How many of those have one video display that depicts an entertaining display and one video display that depicts the game of bingo?**

No current Bally Class II machines have two video displays. Our game can have a video display dedicated to promotional entertainment, but the main video display will simply has an area of the screen dedicated to a bingo card.

17. **What are the kinds of details that make gaming machines appealing?_____**
Are these important?
Graphics? Yes____No____
Theme of Games Yes____No____
Recognizable Brand – e.g. Wheel of Fortune Yes_____No_____
Speed of Play Yes____No____
Availability of Bonuses Yes____No____
Availability of Wagers Yes____No____
Availability of bill acceptors Yes____No____
Size and number of available prizes Yes____No____
Color and looks of cabinets Yes____No____
Placement of the machines on gaming floors Yes____No____
Others_____

All listed details are important in making gaming machines appealing. Additionally, the math models of the games are very important to encourage players to return to their favorite games, along with the availability of features like mystery bonuses and player interaction. The tempo of play is very important also in that a players must have some rhythm with activating play buttons and game performance. Simplicity of play is very important as well, as players are attempting to enjoy their casino experience without having to have difficult rules or standards to learn for playing the games. It is difficult to separate any of these features when deciding game appeal and to the extent the proposed classification standards, or the proposed technical standards, influence one factor, the games will have a tangible effect in decreased player appeal.

18. **Do state/tribal compacts restrict any of the above? Yes____No____ If yes, which ones? _____**

It is our belief for purposes of this discussion that Bally should not be rendering opinions which can be construed as legal interpretations of our tribal clients' state gaming compacts.

19. **Is there a trend toward using bonus rounds on slot machines?_____Does this affect the amount if time it takes to play a game?_____If yes, how long do these games take to play?**

There is a strong trend towards the use of bonus rounds in slot machines. Bonus rounds can last anywhere from 3 to 60 seconds, and occur anywhere from once every 50 to 300 game plays. However over this average play cycle, bonuses currently add about .3 seconds to the average games over prolonged play.

20. **Will you be able to retrofit your existing platforms to meet the requirements of these regulations?_____How much will it cost to do so?_____**

We estimate a time line of not less than three years to produce required changes to systems and games for conversion to comply with the proposed Class II regulations. While it is not possible to produce an exact estimate at this time, our cost of labor, materials, development, legal, compliance and other overhead would be many millions of dollars.

21. **How long does it take to play your 3 touch games that are compliant with the NIGC opinions?_____**

We believe this answer calls for proprietary business information disclosure and cannot submit a response here for this reason.

Conclusion

We understand that recently the NIGC may seek to have proposed technical standards submitted for consideration either in lieu of or to supplement the proposed technical standards that are the subject of commentary in this letter. It is our intent to submit proposed technical standards to the NIGC, and we would respectfully request the NIGC to consider our input on this matter.

It is Bally's belief that Congress has already provided a bright line test to distinguish electronically-aided Class II games from Class III games. Through Bally's years as a leading provider of Class II gaming systems to tribal nations, our product has consistently complied with the applicable legal requirements to keep our Class II products within current Class II standards. In contrast, the classification regulations proposed by the NIGC would muddy this clear line by imposing numerous onerous restrictions on both the underlying games and the types of electronic aids used to play those games. The games that would be permitted under the proposed regulations would be slow, hard to play, and generally unappealing to players. Class II gaming would be limited to a very narrow range of games that would have very little commercial viability. We respectfully urge the Commission to withdraw the proposed regulations and take a fresh look at the classification issue after completing work on reasonable technical standards regulations.

Sincerely,

Mark Lerner

cc: Hon. Cloyce V. Choney, Commissioner
Joseph Valandra, Chief of Staff
Penny Coleman, Acting General Counsel
National Indian Gaming Commission